

A **KAMARUL ARIFFIN JAIT & ORS v. ZURAINI OSMAN**

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL APPEAL NO: 11B-10-12-2015]
6 MAY 2016

B

LIMITATION: *Extension of limitation period – Jurisdiction – Deceased died six months after car accident – Administratrix of deceased's estate claimed for damages more than 36 months after deceased's death – Whether administratrix claim statute-barred – When cause of action accrued – Whether upon extraction of grant of letters of administration by deceased's beneficiaries – Whether administratrix a person under disability within meaning of s. 24 of Limitation Act 1953 – Whether court had inherent jurisdiction to extend limitation periods in statutes – Public Authorities Protection Act 1948, s. 2(a)*

C

D

The deceased in this case passed away six months after he was ran over by a motorjeep driven by the first appellant ('the first defendant'), an employee of the second and third appellants ('the second and third defendants'). The respondent ('the plaintiff'), as the administratrix of the estate of the deceased, commenced an action at the Magistrate's Court against the defendants for damages. The defendants applied to strike out the plaintiff's claim on the ground that it was barred by limitation under s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'). The plaintiff argued that by operation of s. 24 of the Limitation Act 1953 ('the Act'), the limitation period in s. 2(a) of the PAPA commenced only upon the extraction of the grant of letters of administration by the deceased's beneficiaries. The Magistrate dismissed the defendants' application. Hence, the present appeal. The defendants submitted that the plaintiff's contention that time began to run from the date the plaintiff extracted the grant of letters of administration was contrary to the clear language used in s. 2(a) of the PAPA. The plaintiff argued s. 2(a) of the PAPA did not apply to her as she was under a disability and s. 24 of the Act postponed the commencement of the limitation period until she ceased to be under a disability. The plaintiff further argued that time only began run from the date of the extraction of the grant of letters of administration. The issues that arose for the court's adjudication were (i) whether the plaintiff was a person under a disability within the meaning of s. 24 of the Act; and (ii) whether the court had inherent jurisdiction to extend the limitation period in s. 2(a) of the PAPA.

E

F

G

H

Held (allowing appeal with costs; setting aside order of Magistrate and allowing defendant's application to strike out plaintiff's claim):

I

(1) Section 24 of the Act safeguards the position of persons under disability and postpones time for the purpose of computing limitation by providing that the period of limitation commences from the date the person ceases to be under a disability. Section 2(2) of the same Act states

that 'a person shall be deemed to be under a disability while he is an infant or of unsound mind'. The plaintiff was neither. Hence, she was not entitled to invoke in the aid of s. 24 of the Act to postpone the operation of limitation period prescribed by the PAPA. Section 2(a) of the PAPA is couched in mandatory terms that the action must be brought within 36 months. The plaintiff's contention that she was statute-barred was rejected. (para 19)

- (2) The general purpose of limitation provisions is to protect the defendants from being vexed by stale claims; to encourage the plaintiffs not to sleep on their rights; and to ensure that one be confident that after the expiry of the limitation period, one may treat a cause of action as being final. It is important to note the absence of any statutory mechanism in the PAPA or the Act to enable the court to extend time in the interest of justice in an appropriate case. The court had no discretionary powers to extend limitation periods in statutes. (paras 22, 23 & 25)

Case(s) referred to:

Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC (*refd*)
Asia General Equipment and Supplies Sdn Bhd & Ors v. Mohd Sari Datuk Hj Nuar & Ors [2011] 8 CLJ 749 FC (*refd*)
Deraman & Ors v. Mek Yam [1976] 1 LNS 20 FC (*refd*)
Lee Lee Cheng v. Seow Peng Kwang [1958] 1 LNS 32 HC (*refd*)
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC (*refd*)
Phua Chin Chew & Ors v. KM & Ors [1987] 1 LNS 7 SC (*refd*)
Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 6 CLJ 245 FC (*refd*)
SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia, Kementerian Kesihatan Malaysia & Ors [1997] 2 CLJ 564 CA (*refd*)
Tanah Sutera Development Sdn Bhd v. Pentadbir Tanah Daerah Johor Bharu [2002] 2 CLJ 14 CA (*refd*)

Legislation referred to:

Civil Law Act 1956, s. 7(1), (2), (8)
 Limitation Act 1953, ss. 24(1), 33(1)
 Public Authorities Protection Act 1948, s. 2(a)
 Rules of Court 2012, O. 18 r. 19(1)(c), (d), O. 92 r. 4

For the defendants/appellants - Malarselvi Sanmugam; FC
For the respondent/plaintiff - Farhan Mohan Gill Abd Hamid; M/s Farhan Hamid & Kuna

Reported by Najib Tamby

JUDGMENT

SM Komathy JC:

[1] The pivotal issues in this appeal concern (a) whether s. 24 of the Limitation Act 1953 postpones the operation of limitation period prescribed by s. 2(a) of the Public Authorities Protection Act 1948 ("PAPA") in cases

A of death until the extraction of the grant of letters of administration of the estate of deceased; (b) whether the court has inherent jurisdiction to extend the limitation period in s. 2(a) of the PAPA.

[2] For ease of reading, I shall refer to the parties as they were in the court of first instance.

B

The Brief Facts

[3] A little background assists in understanding the matrix out of which this appeal arises. On 20 November 2010, one Osman bin Kachil (“the deceased”) was run over by the motorjeep driven by the first defendant. The first defendant was at the material time employed by the second and third defendants. Six months later on 25 April 2011, the deceased succumbed to his injuries.

[4] The plaintiff as the administratrix of the estate of the deceased instituted this action against the defendants in July 2015 for damages on the ground that the accident was caused solely through the negligence of the first defendant.

[5] The defendants thereupon applied to strike out the action under O. 18 r. 19(1)(c) or (d) of the Rules of Court 2012 on the ground that the claim was barred by limitation under s. 2(a) of the PAPA. The plaintiff refuted the contention and argued that by operation of s. 24 of the Limitation Act 1953, the limitation period in s. 2(a) of the PAPA commenced only upon the extraction of the grant of letters of administration by the deceased’s beneficiaries. He referred to the affidavit in reply filed on behalf of the plaintiff wherein the delay in the extraction of the grant of letters of administration was explained. He contended that the plaintiff should not be penalised for the delay as the necessary relevant documents had to be obtained and the letters of renunciation had to be executed by several family members of the deceased. The plaintiff had promptly filed the claim in the Grik Magistrate’s Court on 11 December 2014 upon the extraction of the letters of administration on 4 December 2014. The action was subsequently withdrawn and reinstituted in July 2015 in the Ipoh Magistrate’s Court for the convenience of the defendants who are based in Ipoh.

[6] The Magistrate accepted the plaintiff’s interpretation on s. 24 and accordingly dismissed the application.

H

The Arguments On Appeal

[7] It was contended by the Federal Counsel that the Magistrate had erred in dismissing the application. Section 2(a) of the PAPA was absolute in its terms. It rendered invalid any action commenced after 36 months after the act, neglect, or default complained of. In this case the act complained of was the accident, and therefore time began to run from the date of the accident, ie, 20 November 2010. The contention that time began to run from the date the plaintiff extracted the grant of letters of administration was contrary to the clear language used in s. 2(a) of the PAPA.

I

[8] She argued that the action should have been filed within 36 months after the accident. However, it was only instituted four years, eight months and 15 days later. The cases of *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245 and *SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia, Kementerian Kesihatan Malaysia & Ors* [1997] 2 CLJ 564; [1997] 2 MLJ 538 were cited in support of the argument.

[9] Counsel for the plaintiff, in his reply submitted that the 36 months limitation period did not apply here as the deceased had passed away before he could bring a claim against the defendants. The plaintiff as the deceased's beneficiary could not commence this action within the 36 months as in law the beneficiaries have no *locus standi* to bring an action without first obtaining the grant of the letters of administration of the estate of the deceased. He cited in this connection *Deraman & Ors v. Mek Yam* [1976] 1 LNS 20; [1977] 1 MLJ 52 and *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361.

[10] Counsel argued that the limitation period in s. 2(a) of the PAPA did not apply to the plaintiff as she was under a disability and s. 24 of the Limitation Act postponed the commencement of the limitation period until she ceased to be under a disability. By virtue of s. 33(1) of the Limitation Act, s. 2(a) of the PAPA must be read together with s. 24 of the Limitation Act where the Government is a party. The plaintiff, he contended, ceased to be under a disability only upon the extraction of the grant of letters of administration, and therefore time only began to run from that date when she became clothed with the necessary authority to commence the action. Counsel relied heavily on the decision of the Federal Court in *Phua Chin Chew & Ors v. KM & Ors* [1987] 1 LNS 7; [1987] 2 MLJ 604, to support his proposition that a beneficiary is a person under disability and by operation of ss. 24 and 33 of the Limitation Act, time only began to run from the date the plaintiff extracted the grant of letters of administration.

[11] In *Phua Chin Chew & Ors v. KM & Ors* [1987] 1 LNS 7; [1987] 2 MLJ 604, the first plaintiff, a school teacher, was suffering from mental disorder. On 29 June 1977 he wrote to the defendants to say that he was resigning from Government service, and his service was terminated. The second and third plaintiffs applied to the court and were on 30 June 1982 appointed as committee to manage the affairs of the first plaintiff under the Mental Disorders Ordinance 1952. One year later, the committee filed an action against the defendants to challenge the first plaintiff's termination. The defendants then applied to strike out the claim brought by the plaintiffs. The application was premised on the ground that the plaintiffs had not filed the action within three years of the date of termination of the first plaintiff's services as required by s. 2(a) of the PAPA. In dismissing the application, the trial court held that as the first plaintiff was suffering from a mental disability when his right of action accrued, s. 24(1) of the Limitation Act applied and consequently the period of limitation did not begin to run until the appointment of the committee.

A [12] The defendants appeal to the Supreme Court was dismissed. Syed Agil Barkbah SCJ explained:

B Since our Limitation Act is modelled on the lines of the English Limitation Act and taking into consideration the purpose of the said Act, our view is that in so far as this appeal is concerned, the relevant provisions of our Limitation Act should also apply when construing section 2(a) of the Act. The provisions of sections 24 and 33(1) of the former should be read subject to section 2(a) of the latter by virtue of section 3 of the former. Section 3 deals with the period of limitation presented by any written law. Section 2(a) of the Act provides the required period of three years. It does not oust the application of the Limitation Act where the Government is a party by virtue of section 33(1) which says the Act shall apply to proceedings by and against the Government in like manner as it applies to ordinary proceedings. Where the Act is silent on the commencement of the limitation period in case of disability, section 24 of the Limitation Act provides that the right of action shall commence from the date when such person ceased to be under a disability or died, whichever event occurred first. In our view, "disability" here refers to legal disability. In the case of an insane person, his disability to institute legal proceeding ceases when a committee is appointed under the Mental Disorders Ordinance 1952 to manage his affairs. Time begins to run from the date of the appointment of the committee and not from the date of the letter of resignation or the acceptance by the Government of the offer to resign. Since the action is against the Government, the period of limitation should be thirty-six months under section 2(a) of the Act. The six year period under section 24 of the Limitation Act applies where the Government is not a party. In the present appeal, since, the committee was appointed on June 13, 1982 and the suit was filed by the committee on June 2, 1983, it was instituted well within time and therefore not statute barred.

G [13] In the alternative, counsel for the plaintiff contended, that the court has inherent jurisdiction under O. 92 r. (4) of the Rules of Court 2012 to extend the limitation period in s. 2(a) of the PAPA to prevent injustice. He referred the court to the following passage in the judgment of the Court of Appeal in *Tanah Sutera Development Sdn Bhd v. Pentadbir Tanah Daerah Johor Bharu* [2002] 2 CLJ 14; [2002] 2 MLJ 65 on the scope of O. 92 r. 4:

H That this rule of court has jurisdictional effect and is of wide import is settled by the judgment of Terrel Ag CJ in *The Motor Emporium v. Arumugam* [1933] MLJ 276 at p 278. The learned acting Chief Justice, when dealing with s. 151 of the Civil Procedure Code (Cap 7) of Malaya, the precursor to O. 92 r. 4 of the RHC said that the provision:

I ... has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, every court must have inherent jurisdiction to do justice between the parties, and apply such principles as are necessary or desirable for attaining such object, and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered.

The Statutory Provisions

A

[14] It would be helpful to set out the statutory provisions relevant to the determination of the issues canvassed in this appeal.

[15] Section 2(a) of the PAPA provides:

Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:

B

- (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

C

[16] Section 33(1) of the Limitation Act reads:

D

- (1) Save as in this Act otherwise provided and without prejudice to the provisions of section 3 of this Act, this Act shall apply to proceedings by or against the Government in like manner as it applies to proceedings between subjects and for the purposes of this Act a proceeding by petition of right shall be deemed to be commenced on the date on which the petition is presented:

E

Provided that this Act shall not apply to any proceedings by the Government for the recovery of any tax, duty or interest thereon or to any forfeiture proceeding under any written law in force in Malaysia relating to customs duties or excise or to any proceedings in respect of the forfeiture of a ship.

F

[17] Section 24 of the Limitation Act in so far as material reads:

- (1) If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years, or in the case of actions to which section 6(4) or section 8 of this Act applies, one year from the date when such person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation had expired:

G

Provided that in any case to which the provisions of section 29 of this Act apply, this subsection shall apply as if the date from which the period of limitation begins to run were substituted for the date when the right of action accrued.

H

Discussion

I

[18] I now turn to address the competing submissions of the parties. The first issue has to do with the question of whether the plaintiff is a person under a disability within the meaning of s. 24 of the Limitation Act.

- A [19] Section 24 safeguards the position of persons under disability and postpones time for the purpose of computing limitation by providing that the period of limitation commences from the date the person ceases to be under a disability. Section 2(2) of the same Act states that “a person shall be deemed to be under a disability while he is an infant or of unsound mind”.
- B It is immediately apparent that only infants and persons of unsound mind come within the scope of s. 24. The plaintiff is neither. Hence, she is not entitled to invoke the aid s. 24 of the Limitation Act to postpone the operation of limitation period prescribed by the PAPA. Section 2(a) is couched in mandatory terms that the action must be brought within 36 months. I therefore reject the plaintiff’s contention that the plaintiff claim is not statute barred.
- C

- [20] That is sufficient to dispose of this appeal. For completeness, however, and in deference to counsels’ full arguments, I propose to deal briefly with one other area of submission under this head. It was the submission that the plaintiff was precluded by law from commencing this action until the extraction of the grant of the letters of administration of the estate of the deceased. The answer to this submission is to be found in s. 7 of the Civil Law Act. The section governs claims brought by the beneficiaries in fatal accident cases. Section 7(1), (2) and (8) of the Civil Law Act 1956 provide:
- D
- E

- (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code .
- F
- (2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.
- G
- (8) If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.
- H

- I [21] The foregoing provisions put paid to the position taken by the plaintiff that the present action could not have been brought by the plaintiff before the extraction of the grant of the letters of administration.

[22] That brings me to the second issue. The plaintiff beseeches the court to invoke the inherent jurisdiction of the court to extend the limitation period. The general purpose of limitation provisions is to protect defendants from being vexed by stale claims, to encourage plaintiffs not to sleep on their rights, and to ensure that one is confident that after the expiry of the limitation period one may treat a cause of action as being final.

A

B

[23] It is important to note the absence of any statutory mechanism in the PAPA or the Limitation Act to enable the court to extend time in the interest of justice in an appropriate case. I do not consider that the case of *Tanah Sutera Development Sdn Bhd v. Pentadbir Tanah Daerah Johor Bharu* [2002] 2 CLJ 14; [2002] 2 MLJ 65, relied on by counsel for the plaintiff gives him the support he seeks. In that case, an objection was taken that the Court of Appeal had no jurisdiction to transfer the appellant's appeal to the Federal Court. It was said that this was because the Court of Appeal had no jurisdiction to hear the appeal and so it followed that it had no jurisdiction to make the order of transfer. In rejecting the argument, the court referred to O. 92 r. 4. I find nothing in the judgment which supports the view that the court has inherent power to extend limitation periods in statutory provisions.

C

D

[24] Apropos this point of law, it is instructive to refer to the decision in *Lee Lee Cheng v. Seow Peng Kwang* [1958] 1 LNS 32; [1960] MLJ 1. There, an attempt was made to extend the time limited for bringing an action in a running-down claim. Counsel for plaintiff relied on a paragraph in the Third Schedule of to the then Courts Ordinance which conferred jurisdiction on a court to extend or abridge time. The Court of Appeal, in affirming the judgment of the trial judge held that whilst there might be jurisdiction to extend time, the particular statute, namely the Civil Law Ordinance 1956 did not confer upon the court the power to extend time. Thomson CJ said:

E

F

Moreover if the appellant's contention is correct it will have extremely far-reaching and, in my opinion, calamitous consequences. The period prescribed by section 8(3)(b) of the Civil Law Ordinance is a period of limitation. If the Court has power to extend it then it has power to extend any other period of limitation and it would thus be open to every litigant with a statute-barred grievance to come to the Court and attempt to have the statutory bar removed so that he could be heard. The principle of limitation is a very ancient one (see 3 Black. Com. 185) and the object of modern statutes of limitation has been thus described by Wood, Vice-Chancellor, in the case of *Manby v. Bewicke* 3 K & J 342 352: ...

G

H

There is, of course, no reason why the legislature should not detract from the certainty which the subject thus enjoys by giving the Courts power to enlarge the periods of limitation prescribed by statute but one would expect any statute which had this object to express it with very great clearness and particularity. As was said by Archibald J., in the case of *Washer v. Elliott* ILR 57 All 242 247; AIR 1935 PC 85 350.

I

A Hepworth J added:

I cannot think that the intention and effect of the Second Schedule, any more than that of section 151 of the Indian Civil Procedure Code, is to give the Court power to make an order directly negating a statutory provision. It seems to me that if the Second Schedule does confer any powers then the exercise of such powers does not extend to making orders in direct contradiction of the provisions of other statutes. It seems to me that if the word “jurisdiction” in the Second Schedule is interpreted as meaning “the conferring of power to take cognisance of the laws in force in an area or district” the meaning of the Second Schedule is clear and no difficulties arise.

C [25] In my view, the foregoing passages exemplify that the plaintiff’s contention is untenable. Order 92 of the Rules of Court is not intended to give the court power to make an order directly negating a statutory provision. The court has no discretionary powers to extend limitation periods in statutes.

D [26] The court, however, has power to prevent a defendant from relying on limitation as a defence if he has been guilty of unconscionable conduct. The decisions of the Federal Court in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113 and *Asia General Equipment and Supplies Sdn Bhd & Ors v. Mohd Sari Datuk Hj Nuar & Ors* [2011] 8 CLJ 749; [2012] 3 MLJ 49 are illustrative of this point. In the former case, it was authoritatively established by the Federal Court that the doctrine of estoppel may be applied to prevent or preclude a litigant from raising the provisions of a statute in answer to a claim made against him in circumstances where it would be unjust or inequitable to permit him to do so.

F [27] In the latter case, the court was called upon to decide whether the doctrine of estoppel could be invoked by a litigant to defeat a defence of limitation. In answering the question in the affirmative, James Foong FCJ explained:

G Regrettably, the Court of Appeal has failed to consider the case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant bank Bhd* in their judgment. In this case, the Federal Court has declared that:

H The time has come for this court to recognise that the doctrine of *estoppel* is a flexible principle by which justice is done according to the circumstance of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

I Edgar Joseph Jr (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p. 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.

In fact, the factual matrix in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 is very similar to that of our present case. There, the sale of the land to the defendant was conditional upon a right of way preserved in favour of the plaintiff. The defendant disregarded this condition in the agreement and set up limitation as a defence when they were sued by the plaintiff for breach of this condition. Justice Edgar Joseph Jr J decided that:

So far as may be necessary, I would hold that based on these *dicta* the Limitation Act is purely procedural: see *Othman and Anor v. Mek* and *Michell v. Harris Engineering Co Ltd*. And, therefore, in certain circumstances, one can estop oneself out of the Limitation Act by conduct.

[28] In the present instance, estoppel cannot be avail to the plaintiff as there is no evidence of misconduct on the part of the defendants so as to preclude them from relying on the defence of limitation.

Conclusion

[29] For the reasons given, I allow the appeal with no order on costs. The order of Magistrate is accordingly is set aside and the defendant's application to strike out the plaintiff's claim is allowed.

A

B

C

D

E

F

G

H

I